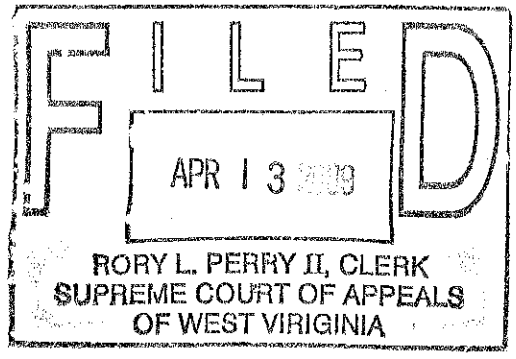
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LLOYD MICHAEL NOLAND, R.N.

Appellant,

v. **Appeal No.: 34702**

VIRGINIA INSURANCE RECIPROCAL, and THE RECIPROCAL GROUP, INC., a Virginia Corporation, LISA HYMAN, individually, COVERAGE OPTIONS ASSOCIATES a.k.a. KENTUCKY HOSPITAL SERVICE COMPANY, a Kentucky Limited Liability Company, KENTUCKY HOSPITAL ASSOCIATION, a Kentucky Corporation, and RICHARD STOCKS,



Appellees.

REPLY BRIEF OF APPELLANT, LLOYD MICHAEL NOLAND, R.N.

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REPLY BRIEF OF APPELLANT LLOYD MICHAEL NOLAND, R.N.

I. OBJECTIONS TO APPELLEES' STATEMENT OF FACTS

Appellee Stocks states in fn. 2 on p. 7 of his Brief that "There are no questions of fact regarding the alleged UTPA violations because any other duties under the UTPA that arise out of the determination of coverage ceased with the denial of the claim. Noland's injury was complete when he was denied coverage." Appellee Stocks' statement is grossly inaccurate because Nurse Noland was an insured under the policy even if coverage had been denied for this particular claim. For example, there were various communications between Nurse Noland's counsel and the VIR after the denial of his claim. Under W.Va. Code § 33-11-4(9)(b), the VIR and Appellee Stocks are under a duty to "acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies. . ." The point is that Nurse Noland was insured under the VIR policy, but the VIR asserted no coverage in this case. In the end, the VIR did have coverage for their insured from at least May 24, 2000

through August 1, 2000. However, the critical point is that the duties under the UTPA arise to an insured whether or not the insurer dreams up a bogus reason to deny coverage.

Noland is amazed by the VIR's assertion in its Brief that it protected Noland's interest by settling the underlying claims brought by plaintiff. This assertion, made by the VIR in several instances, cannot be further from the truth. Apparently, the VIR has forgotten that the Noels, plaintiffs in the underlying medical malpractice litigation, never asserted any claims against Noland. Rather, the only party that ever asserted claims against Noland in the underlying medical malpractice action was the VIR's other insured, Beckley Appalachian Regional Hospital ("BARH"), which asserted a third-party contribution claim against Noland. The settlement VIR reached with the Noels did nothing to protect Noland's interest because it did not extinguish any claims by the Noels against Noland and it did not extinguish the claims against Noland brought by BARH. Not only did the VIR not protect Noland's interest, it completely ignored them, as fully set forth in Noland's Statement of Facts in his Appellant's Brief, which is incorporated by reference as if fully set forth herein.

VIR also asserts that because Noland is not subject to any exposure for these claims now, he has no damages. However, this ignores the fact that the VIR had a duty to defend and indemnify Noland from August 1, 2000 through the date any claims against him were dismissed or terminated, which is a primary issue brought to the attention of this Honorable Court in this appeal due to the Circuit Court's error in deciding this issue. He has been exposed to these claims for more than eight years

because of the actions of the VIR and BARH. Only a calloused insurer would argue that the constant worry over a pending claim did not cause Noland professional and emotional distress. Furthermore, whether Noland has spent a single dime for his own defense or whether he was defended by another insurer is simply not relevant to the issue of whether the VIR owed Noland such a duty, which it breached.[1]

Noland also objects to the VIR's conclusory statement that his nurse's policy through ACE was next in line after the VIR Primary Policy and that ACE should have contributed to the settlement with plaintiff. Whether the ACE policy should have been next in line is a legal issue that was not addressed by the Circuit Court. Furthermore, there is no reason that ACE should have contributed to a settlement with the underlying plaintiffs in the medical malpractice action (the Noels), when the Noels never asserted a claim against Noland. That is another issue that is not before this Honorable Court in this appeal, but rather is being floated out as part of the smokescreen the VIR is attempting to create to mask its own egregious conduct against Noland.

Whether or not Noland was defended by ACE is simply not relevant to the issue of whether the VIR owned Noland a duty to defend and indemnify him after August 1, 2000. The VIR's continued breach of that duty, and the potential damages to be assessed against the VIR as a result of that breach. The VIR simply did nothing to protect Noland's interest at any point, ever.

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[1] Ironically, if not for the presence of another insurer, it is unlikely that this case would have proceeded in the twisted fashion that it did, on several levels.

At p. 17 of its Brief, the VIR asserts that the exhaustion provision contained in the VIR primary policy is clear and unambiguous and argues that the settlement with the Noels clearly exhausted the VIR's primary policy based on the amount paid to the Noels under the VIR's primary policy and VIR's umbrella policy.[2] However, the argument advanced by Noland is more involved than that. The dispute is not how much was paid under each policy so much as it is about what claims those payments were made for, i.e., medical negligence claims against BARH or bad faith claims against the VIR. Tellingly, the VIR does not address this issue.

II. ARGUMENT

A. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT HE HAS COVERAGE UNDER THE VIR UMBRELLA POLICY AND IS ENTITLED TO A DEFENSE AND INDEMNITY IF THE PRIMARY POLICY IS EXHAUSTED.

Appellant Mike Noland is entitled to indemnity and a defense under the VIR Umbrella Policy with respect to the third-party claims against him from August 1, 2000 to the present. The Circuit Court erred when it held there was no coverage for this time period. There must be coverage for Noland under at least one of the VIR's policies. Section II. A of the VIR Umbrella Policy provides, in pertinent part: "this agreement covers any insured under the primary insurance **to the same extent that they are covered under the primary insurance.**" The term "primary insurance" is a specifically defined term.

According to Section VII.Q.11 of the VIR Umbrella Policy, "primary insurance

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[2] Note that the VIR admits here that the VIR Umbrella Policy is not exhausted.

means the insurance policies listed in the Schedule of Primary Underlying Insurance." The Schedule of Primary Underlying Insurance lists the VIR Primary Policy, Policy No. KYPL 299998. *See*: Exhibits to Amended Complaint. Clearly, the "primary insurance" referred to in Section II.A. of the VIR Umbrella Policy is the VIR Primary Policy, and as such, because the circuit court found that petitioner is insured under the VIR Primary Policy, he must be insured under the VIR Umbrella Policy pursuant to Section II.A. of the VIR Umbrella Policy.

Section II.B. of the VIR Umbrella Policy states:

> This agreement covers those sums **in excess** of the amount payable under primary insurance that any insured becomes legally obligated to pay as damages because of injury or damages to which this coverage applies. **This coverage only applies to injury or damage covered by the primary insurance. This coverage is subject to the same terms, conditions, exclusions and limitations as the primary insurance, except with respect to any provisions to the contrary contained in this contract.** (Emphasis added).

Clearly, the VIR Umbrella Policy is an excess policy which does not take effect until the VIR Primary Policy is exhausted. To hold otherwise would be to defeat its very nature as an excess policy and transform it into a primary policy, which is not its intent. Yet, this is exactly what the circuit court's ruling does. Therefore, VIR owes Noland a duty to defend and indemnify him against any claim Noland becomes legally obligated to pay as damages in excess of the amount owed under the VIR Primary Policy. In other words, under the VIR Umbrella Policy, the VIR must defend and indemnify Mike Noland even **after** August 1, 2000 for the third-party claims against

him.

Section IV of the VIR Umbrella Policy, titled "Additional Benefits," provides:

> All of the following are **in addition** to the Limits of Liability:
>
> If the **limits of liability of primary insurance have been exhausted** by payments of claims to which coverage A would apply . . . we **shall defend** any claim or suit brought against any insured covered for damages covered under this policy. We have the right to investigate, to negotiate and to settle such claim or suit if we think that is appropriate. (Emphasis added).

As set forth above, "primary insurance" is defined under the VIR Umbrella Policy as those insurance policies listed in the Schedule of Primary Underlying Insurance. Further, as set forth above, the exhaustion provision of Section IV of the VIR Umbrella Policy is limited to the VIR Primary Policy.

Because the VIR Primary Policy has arguably been exhausted, the VIR owes a duty to defend under the Additional Benefits section of the VIR Umbrella Policy. The Raleigh Circuit Court's July 25, 2003 Order eviscerates this section of its clearly intended meaning, as does the March 28, 2008 Order upholding the prior ruling.

Logically, the Circuit Court's ruling on the coverage issues just doesn't make sense. The Circuit Court correctly found that there was coverage under the VIR Primary Policy, but also found that the VIR Primary Policy was exhausted. Given that predicate, there **must** be coverage under the VIR Umbrella Policy. If there is coverage under the VIR Primary Policy, there are only two situations in which there would be no coverage under the VIR Umbrella Policy. The first would be if the VIR Primary

Policy is not yet exhausted (which would mean there would still be coverage available under the VIR Primary Policy); the second would be if the VIR Umbrella Policy is also exhausted, which is not the case here. The VIR has admitted the Umbrella Policy is not exhausted. The Circuit Court's ruling does not make sense logically. It cannot be explained, and must be corrected.

Appellees have argued that the VIR has no duty to defend Noland because of Noland's coverage through his ACE-USA policy. This argument is a red herring and is irrelevant to the pending coverage issues. The VIR owes Noland a duty to defend and indemnify him regardless of whether he might have other coverage available. Furthermore, the VIR Umbrella Policy specifically defines the insurance policies to which it is excess. As such, the VIR Umbrella Policy is excess only to the VIR Primary Policy, without regard to any other coverage that may benefit Noland. Although not relevant, the Circuit Court's July 25, 2003 Memorandum Opinion and Order did not address the "other insurance" clauses, and as such, the issue is not before this Honorable Court on this appeal.[3]

Therefore, this Honorable Court should reverse the Circuit Court's March 28, 2008 Order denying Noland's Motion for Reconsideration and reverse that portion of the Circuit Court's July 25, 2003 Order which denied in part Noland's Motion for Partial Summary Judgment on the issue of coverage under the VIR Umbrella Policy. This Honorable Court should rule that VIR owes Noland a duty to indemnify up to the

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[3] Even if analyzed, the "other insurance" clause would result in coverage under the VIR Umbrella Policy for Mike Noland.

exhaustion of the remaining limits of the Five Million Dollars ($5,000,000.00) limit of the Umbrella Policy and owes Noland a duty to defend **after August 1, 2000** for BARH's third-party claims against Noland under the VIR Umbrella Policy.

B. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT HE IS ENTITLED TO COVERAGE AND A DEFENSE BECAUSE OF AMBIGUOUS POLICY LANGUAGE.

1. The Ambiguity to VIR's Exhaustion Provision Requires VIR to Defend Noland.

The exhaustion provision from the VIR Primary Policy states:

> Our right and duty to defend ends when **we have exhausted the applicable limits of liability** stated in Section III of the Declarations in the payment of judgments or settlements under this policy.

Id. (Emphasis added). *See*: Exhibits to Amended Complaint.

This provision is ambiguous for two reasons. First, this provision lacks specific guidelines that govern a situation where multiple insureds are covered by the insurance policy. The provision does not specify which insureds will enjoy the protection of the duty to defend and which insureds will be left without coverage and/or a defense. Therefore, the insurance provision above is ambiguous as to multiple insureds under the same policy.

Second, the provision is ambiguous in terms of how the policy limits for purposes of exhaustion apply to claims against an insured or insureds and claims **against the insurer itself**, which theoretically should **not** be included in a policy paid for by an insured.

The Supreme Court of North Carolina has specifically addressed a situation quite similar to the underlying case in Brown v. Lumbermens Mutual Casualty Co., 326 N.C. 387; 390 S.E.2d 150 (1990). The Brown court examined whether an insurance company's duty to defend was terminated with regards to an ambiguous insurance provision. Id at 154. The insurance policy provision at issue stated:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. Id at 153.

The Brown court found the above provision to be ambiguous because it did not provide a manner by which the coverage must be exhausted before the duty to defend terminates. Id. at 154. Therefore the Brown court adopted the following rule to determine whether or not a duty to defend ends when applicable limits of liability are exhausted:

> The question is whether, considering both propositions, exhaustion of the coverage limits must be by way of settlement or judgment before the duty to defends ends, or whether simply exhausting the limits in any manner terminates the duty. Both interpretations are possible. Id.

The Court further stated that, "[g]iven the ambiguity, the provision relating to the insurer's duty to defend must be interpreted favorably to the insured." Id. As a result, the ambiguity of the insurance provision is construed against the party seeking to enforce it. Id. *See also*: ABT Building Products Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, 472 F.3d 99 (4th Cir. 2006).

Appellees argue that Rubrich v. Piotruszewicz, 259 Wis. 2d 481; 655 N.W.2d 546 (Wisc. App. 2002) contradicts Brown. However, Rubrich is an unpublished per curiam opinion with no precedential value. Furthermore, all Rubrich does is reach a different conclusion or espouse a conflicting viewpoint. It doesn't mean Brown is wrong or incorrect. The main difference, however, between Rubrich and Brown is that Brown has precedential, persuasive value. The appellees also cite other cases from several other jurisdictions, none of which is binding precedent on this Honorable Court, for the proposition that the exhaustion provision is clear and unambiguous. The distinguishing factor with all these cases is that they require an element of good faith in the settlement resulting in exhaustion of the policy at issue. That element of good faith is clearly lacking here, which is another reason why Brown should be controlling.

The rule set forth in Brown is applicable to the facts of the underlying case because the insurance provision provided by VIR to petitioner is ambiguous with regards to multiple insureds. The insurance provision fails to provide clear and unambiguous guidelines that specify the manner in which VIR's duty to defend will operate in the event that multiple insureds require such a duty. The provision fails to set forth what amounts of the coverage will be delegated to the insureds covered by said policy. **The provision also fails to address the use of policy proceeds by an insurer to settle claims against itself.** In the case at bar, it is plaintiff's understanding and belief that the underlying Noel settlement resolved not only the Noels' claims against BARH, but also their bad faith claims against the VIR. There is no evidence as to any allocation of the settlement amount as between insured and

insurer, or between medical negligence and bad faith claims.

Therefore, applying the rule set forth in Brown, the question is whether exhausting the limits of liability in settling the underlying claims on behalf of either VIR or BARH will terminate the VIR's duty to defend Noland. Clearly, the insurance provision does not set forth the manner in which such a question is to be resolved. As such, the provision is ambiguous and is unenforceable as to the petitioner, Mike Noland, and any interpretation of said provision must be favorable to the insured, Mike Noland.

2. Appellant Has a Reasonable Expectation of Coverage under Both the VIR Primary Policy and the VIR Umbrella Policy.

It is well settled law in West Virginia that ambiguous terms in an insurance contract are to be strictly construed against the insurer and in favor of the insured. Marcum Trucking Co., Inc. v. U.S. Fidelity and Guar. Co., 190 W. Va. 267, 271; 438 S.E.2d 59, 63 (1993). A policy is ambiguous when language is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Change, Inc. v. Westfield Ins. Co., 208 W.Va. 654; 542 S.E.2d 475 (2000). Because the VIR primary policy and VIR Umbrella Policy are ambiguous, plaintiff has a reasonable expectations of coverage under said policies.

Recognition of a claim based on a reasonable expectation of insurance is consistent with the traditional rule that any ambiguities in an insurance policy be resolved in favor of the insured. Keller v. First Natl. Bank, 184 W. Va. 681; 403 S.E.2d 424 (1991). Once an insurer creates a reasonable expectation of coverage, the insurer

must give the coverage or promptly issue a denial. Id.

In West Virginia, the doctrine of reasonable expectations is that the objectively reasonable expectations of applications and intended beneficiaries regarding the terms of insurance contracts will be honored even though pain staking study of the policy provisions would have negated those expectations. Natl. Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734; 356 S.E.2d 488 (1987). The doctrine of reasonable expectations places the burden on the insurer to communicate coverage and exclusions of a policy to the insured accurately and clearly. Id.

In this situation, appellant Noland has a reasonable expectation of coverage based on the ambiguous policy language concerning the exhaustion of benefits under the VIR Primary Policy. He also has a reasonable expectation of coverage based on the actions of attorney Foster (who was retained by the VIR) in the underlying Noel litigation.[4] Therefore, this Honorable Court must find that a reasonable expectation of coverage was created in favor of Noland, and reverse the judgment of the Raleigh County Circuit Court.

C. THE CIRCUIT COURT ERRED WHEN IT IMPROPERLY APPLIED THE STATUTE OF LIMITATIONS TO NOLAND'S CLAIMS FOR BAD FAITH UNDER THE UTPA.

1. There Is No Distinction Between When the Statute of Limitation Runs in a First-Party Bad Faith Action and a Third-Party Bad Faith Action.

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[4] The Fourth Circuit Court of Appeals has suggested that under West Virginia law, a reasonable expectation of coverage might also be created by representations of an insurer's agent which might be contrary to unambiguous policy coverage. See: Burlington Ins. Co. v. Shipp, 215 F.3d 1317, 2000 W.L. 620307 (4th Cir. 2000) (Unpublished opinion).

Appellees have two main arguments they advance to support the assertion that this appeal must fail as to the statue of limitation issues. First, they argue that Noland doesn't cite any factual errors by the Raleigh County Circuit Court; and second, they argue Noland cannot point to any exception to the applicable statute of limitations. Both these arguments must fail for the same reason: the problem is that the Circuit Court misapplied the law; its errors are legal, not factual. No "exception" to the statue of limitation is required, as the statute was incorrectly applied in this case.

In evaluating Mike Noland's first-party statutory bad faith claims, the Circuit Court improperly concluded that there is a distinction between the statute of limitation in a first-party bad faith action versus a third-party bad faith action. In reaching this erroneous conclusion, the Circuit Court relied upon Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857 (N.D.W.Va. 2003). In relying on Johnson, the Circuit Court reasoned that there are distinguishing factors between first and third-party statutory bad faith claims on the statute of limitation issues. The Circuit Court's reliance on Johnson, however, is erroneous because the Johnson court did not follow clearly established West Virginia law on this issue.

When new points of law are announced in West Virginia, the Supreme Court of Appeals articulates those points through syllabus points. *See,* Walker v. Doe, 210 W. Va. 490; 558 S.E.2d 290 (2001). Accordingly, syllabus points reflect the law of this state and must be followed unless overruled by a subsequent opinion. Noland is not

attempting to read these points "in a vacuum". He is applying what this Honorable Court has pronounced as a black-letter rule of law.

Under West Virginia law, claims involving unfair settlement practices that arise under the UTPA are governed by the one-year statute of limitations for personal actions not otherwise provided for. Syl. Pt. 1, Klettner v. State Farm Mut. Auto. Ins. Co., 205 W. Va. 587; 519 S.E.2d 870 (1999). The one-year statute of limitations which applies to claims of unfair settlement practices brought pursuant to the UTPA does not begin to **run until the appeal period has expired on the underlying cause of action upon which the statutory claim is predicated.** Id. at Syl. Pt. 7 (emphasis added).

Although Klettner is a third-party bad faith action, this Honorable Court does not distinguish between the statute of limitation in first-and third-party bad faith actions in its syllabus point. Instead, it clearly states that the statute of limitation for claims brought pursuant to the UTPA does not begin to run until the appeal period expires. Because both first and third-party bad faith claims are brought pursuant to the UTPA (or were when the Klettner case was decided), the Court would have limited its ruling to third-party bad faith actions if it so intended.[5] The reading advanced by appellees would convert Klettner to a *per curiam* decision, which it is not.

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[5] Furthermore, the District Court did not limit its certified question to the third-party context when it framed the certified question to the Supreme Court of Appeals as follows: "whether the one-year statute of limitations for alleged unfair claim settlement practices under W.Va. Code § 33-11-4(9) is tolled until the appeals period has run and/or all appeals in the underlying tort litigation have been exhausted?" Klettner, 205 W. Va. 587at 590; 519 S.E.2d at 873.

Appellee Stocks has cited Jenkins v. J.C. Penney Cas. Ins. Co., 167 W. Va. 597, 280 S.E.2d 252 (1981) for its discussion enunciating three reasons for not permitting a third-party claim to go forward until the underlying matter was finalized. According to Jenkins, those reasons are:

> (1) To permit a direct action against the insurance company before the underlying claim is ultimately resolved may resolve in duplicitous litigation since the issue of liability and damages as they relate to the statutory settlement duty are still unresolved in the underlying claim. (2) A further policy reason to delay the bringing of the statutory claim is that once the underlying claim is resolved, the claimant may be sufficiently satisfied with the result so that there will be no desire to pursue the statutory claim. (3) To avoid the prejudicial impact of mentioning insurance coverage at trial.

However, each of those factors may also be present with litigation by an insured against an insurer, which is substantively a first-party insurance claim, but may procedurally be brought as a third-party claim in the context of suit by an injured party against an insured/alleged tortfeasor who then sues his insurer seeking coverage for the claim.

Any rationale for applying the Klettner rule to third-party UTPA claims should also apply to first-party claims. Many times, particularly where coverage issues are involved, a first-party claimant will not know if he or she has a valid UTPA claim until the underlying coverage action has been resolved. If coverage is resolved in favor of the insurer, often times there will be no bad faith or UTPA claim. A resolution of a coverage issue against the insurer and in favor of the insured, on the other hand, serves to strengthen or establish a bad faith or UTPA claim. In either case, an

accurate determination cannot be made before the conclusion of the coverage action.

From a policy standpoint, applying different rules to third and first party UTPA claims does not make sense to place a third-party claimant (who has no contractual relationship to the insurer) in a better position than the first-party claimant who does have a contractual relationship to the insurer. Yet this would be the result if the Klettner rule was only applicable to third-party UTPA claims. Essentially, that interpretation would create a longer statute of limitations for third-party claims than first-party claims, which should not be the case. The first-party claimant should be on at least equal footing with respect to the time afforded to bring a claim, particularly since despite the existence of a contractual relationship, the UTPA claim is subject to the shorter limitations period for torts rather than the longer statute of limitations applicable to contract actions. It is not that a third-party claimant has to wait that long to bring a claim, rather, it is permitted to do so. Under Stock's interpretation, the first-party claimant is not afforded the same right.

Appellees want to argue a statute of limitations would never run if this Honorable Court were to accept the application urged by Noland. However, this simply is not true. Noland is not arguing that this is a continuing breach which would result in new statute of limitations for each breach. Rather, under Klettner, the statute does not being to run until the expiration of the appeal period for the underlying action. If this were a breach of contract action, Noland would not be in violation of the contract statute of limitations. This is a tort action with a tort statute of limitations. Noland is merely arguing that as an insured and therefore a first-party claimant, he should not

be placed in a worse position than a third-party claimant, which has no contractual relationship with the insurer.

Finally, there is no reason to open the door to a bevy of potential legal malpractice actions against attorneys who have reasonably read Klettner to apply to both first-party and third-party UTPA claims. If the Klettner Court had intended its ruling to apply only to third-party claims, all it had to do was insert "third-party" somewhere in Syllabus Point 7 of its opinion. It did not.

2. The Statute of Limitation Governing a Claim for Violation of the UTPA Had Not Expired; Therefore, the Motions to Dismiss Should Have Been Denied.

The statute of limitations governing breaches of the UTPA, W. Va. Code §33-11-4(9), is one (1) year. W. Va. Code §55-2-12(c) (1994). This Honorable Court held that "the one-year statute of limitations which applies to claims of unfair settlement practices brought pursuant to West Virginia Code 33-11-4(9) **does not begin to run until the appeal period has expired** on the underlying cause of action upon which the statutory claim is predicated." Syl. Pt. 7, Klettner v. State Farm Mut. Auto. Ins. Co., 205 W. Va. 587, 588; 519 S.E.2d 870, 872 (1999). (Emphasis added).

The underlying case upon which this action is predicated, Beckley Appalachian Regl. Healthcare v. Lloyd M. Noland et al., Civil Action 98-C-1868, was still pending in the Circuit Court of Kanawha County at the time the Amended Complaint was filed and when the Circuit Court granted appellees' motions to dismiss. The Amended Complaint was filed on November 25, 2005, and the claim of Noland was dismissed on August 21, 2008. Because the underlying case upon which the UTPA claim is

predicated was dismissed after the UTPA case was filed, the statute of limitations for Mr. Noland to file a claim for a violation of § 33-11-4(9) against the appellees had not yet commenced, let alone expired. Accordingly, pursuant to Klettner, Mr. Noland's Amended Complaint was filed within the statute of limitation for all appellees, and the appellees' Motions to Dismiss should have been denied by the Circuit Court.

Moreover, the Circuit Court already addressed this issue in its Memorandum dated July 27, 2005. Counsel for all parties thoroughly briefed this issue and presented argument at the hearing. After examining the arguments of counsel and Klettner, the Circuit Court properly concluded that the statute of limitation had not yet commenced. *See*: August 25, 2005 Order. The law is clearly set forth in Klettner and the Circuit Court properly applied it at that time. The facts were exactly the same as they were when the lower Court previously examined this issue. As such, the Circuit Court should have reached the same conclusion and found that the statute of limitations had not expired. Instead, the Circuit Court committed error.

The appellees contended that the Circuit Court should depart from the clear bright line test set forth in Klettner and adopt a different method for determining when the statute of limitation would commence. Essentially, the respondents argued that since VIR denied Mr. Noland coverage under the Primary Policy on October 23, 2000, he only had until October 23, 2001 to raise statutory bad faith claims against them. There is absolutely no binding West Virginia law supporting this position, which fails in the face of Syllabus Point 7 of Klettner.

In support of this ill fated proposition, the appellees cited an opinion from the United States District Court for the Northern District of West Virginia, Johnson v. Acceptance Ins. Co., 292 F. Supp. 2d 857 (N.D.W.Va. 2003)[6]. In that case, the estate of a mentally impaired resident of a care facility brought a first-party bad faith action against an insurance company and the company's managing agents alleging the improper denial of liability coverage and the failure to defend a wrongful death action brought in state court. Id. at 862. The insurance company moved for summary judgment citing the expiration of the statute of limitation for a claim for violation of W. Va. Code § 33-11-4(9). Id. at 870. In granting summary judgment, the court, based on the faulty premise that post-suit acts could not be used to establish a breach of the UTPA, held that the statute ran from the denial of coverage to an insured.

Johnson is completely inapplicable to this case as it was decided under the premise that there is no post-suit bad faith. In Johnson, the court relied on Larck v. Wright, Civil Action No. 5:01CV81 for the proposition that "Acceptance's conduct subsequent to the filing of this civil action will not be considered. . . ." Id. at 869. Subsequently, the West Virginia Supreme Court of Appeals held that post-suit breaches of the UTPA are actionable under West Virginia law. *See generally*, Barefield v. DPIC Co., Inc., 215 W. Va. 544; 600 S.E.2d 256 (2004). The outcome in Johnson would necessarily have been different if the court considered post-suit acts breaches

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[5] *Johnson* is not binding authority on this Court because it is a United States District Court case, and its holding is based on federal common law, which is not the law of West Virginia.

of the UTPA during the case upon which the UTPA was predicated, which would have required the application of Klettner. In sum, Johnson is no longer good law as it was based on a federal common law, Larck, which has since been overruled by Barefield.

Moreover, in this case, all of the breaches of the UTPA regarding the failure to properly investigate the claim, the failure to properly assign separate adjusters and the general favoring of one insured over another all occur during the pendency of the underlying case upon which this case is predicated. While there are alleged breaches of the UTPA regarding coverage, there are also alleged breaches of the UTPA regarding the post-suit acts themself. The outcome of the currently pending medical malpractice case will assist the jury in determining damages in this case for the breaches of the UTPA. As such, the fundamental premise upon which Johnson was decided has not only been overruled by Barefield, but it has no application to this case as the alleged breaches of the UTPA in this case include post-suit acts that are not related to coverage issues.

D. THE LOWER COURT APPLIED AN IMPROPER STANDARD IN GRANTING APPELLEES' MOTIONS TO DISMISS; THEREFORE, ITS RULINGS MUST BE REVERSED.

Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, "[d]ismissal for failure to state a claim is proper where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Kessel v. Leavitt, 204 W. Va. 95; 511 S.E.2d 720 (1998). The policy underlying Rule 12(b)(6) is to ensure that cases are decided upon the merits. *See*, John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 605; 245 S.E.2d 157,159 (1978). Thus,

"if the complaint states a claim upon which relief can be granted ***under any legal theory***, a [motion to dismiss] ***must*** be denied." Id. Under the rule, all the pleader is required to do is to set forth sufficient information to outline the elements of his claim. Id. A trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail. Id. Whether the plaintiff can prevail is a matter properly determined on the basis of proof, and not merely on the pleadings. Id.

The plaintiff's burden of resisting a motion to dismiss is light. McGinnis v. Cayton, 173 W. Va. 102, 104; 312 S.E.2d 765, 768 (1984). In evaluating a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, and its allegations are to be taken as true. *See,* John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603; 245 S.E.2d 157 (1978). When assessing the sufficiency of the complaint on a Rule 12(b)(6) motion, a court "should not dismiss the complaint unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." McGinnis, 312 S.E.2d 765 at 768. (citing Stricklen v. Kittle, 168 W. Va. 147, 287 S.E.2d 148 (1981)). In other words, the court should dismiss a complaint for failure to state a claim only where"it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Albright v. White, 202 W. Va. 292, 297; 503 S.E.2d 860,865, *quoting,* Murphy v. Smallridge, 196 W. Va. at 36; 468 S.E.2d 167, 168 (1996). Therefore, in response to a motion to dismiss, the plaintiff must only show relief could be granted under any set of facts that might reasonably arise under the allegations set forth in the Amended Complaint.

In the case at hand, Mike Noland asserted facts in his Amended Complaint against appellees upon which relief can be granted. In his Amended Complaint, Mike Noland asserted numerous breaches of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-1 through 33-11-10 ("UTPA") against appellees. Specifically, Noland alleged that both Lisa Hyman and Richard Stocks breached their duty to act in good faith and fair dealing by complying with the law of West Virginia regarding handling and adjusting his claim. *See*, ¶ 84, ¶ 85 of Amended Complaint. He further alleged that the appellees, including Hyman and Stocks, violated the UTPA and applicable insurance regulations because their conduct established a general business practice, which includes, but is not limited to: (1) misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue, (2) failing to adopt and implement reasonable standards for prompt investigation of claims arising under insurance policies, and (3) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement. *See*: Amended Complaint. Finally, Mike Noland alleged that appellees willfully, maliciously, and intentionally breached the UTPA. *See*: Amended Complaint.

In granting appellees' Motions to Dismiss, the Circuit Court improperly found that Mike Noland could not state a claim upon which relief can be granted. Rather than considering all of the allegations contained within Mike Noland's Amended Complaint, the Circuit Court only focused on the common law duty of

good faith and fair dealing, and the statutory duty to provide a defense. In doing so, the Circuit Court lost site of the allegations that both Hyman and Stocks breached the UTPA in multiple other respects, such as those mentioned above.

These factual questions regarding the breach of the duty of good faith and fair dealing are to be resolved by a trier of fact, and not by the trial court on a motion to dismiss. Because Mike Noland asserted sufficient facts in his Amended Complaint to overcome a Rule 12(b)(6) motion and the allegations must be viewed as being true, the Circuit Court improperly granted appellees' motions to dismiss.

E. ALTHOUGH THERE IS NO NEED TO RULE ON THE DOCTRINE OF RELATION BACK BECAUSE *KLETTNER* CLEARLY ESTABLISHES WHEN THE STATUTE OF LIMITATIONS COMMENCES, THE DOCTRINE OF RELATION BACK APPLIES IN THIS CASE.

Under Rule 15 of the West Virginia Rules of Civil Procedure, an amendment to a complaint changing a defendant or the naming of a defendant will relate back to the date the plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arouse out of the same conduct, transaction, or occurrence as asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant within the period prescribed for commencing an action and service of process of the original

complaint. Brooks v. Isinghood, 213 W. Va. 675; 584 S.E.2d 531 (2003).

In applying the Brooks test, this Honorable Court should conclude that the Amended Complaint relates back. First, the claims asserted in the Amended Complaint arouse out of the same conduct, transactions, and occurrences as asserted in the original complaint. Secondly, the appellees, Lisa Hyman, Coverage Options Associates and Kentucky Hospital Association were not prejudiced by the filing of the Amended Complaint, and they have ample opportunity to formulate a defense. No injustice ensues from allowing the Amended Complaint to relate back to the original complaint, and its amendment is necessary to permit an adjudication of this case on its merits. Third, these appellees were not named in the original complaint because it was necessary for Mr. Noland to conduct an investigation to ascertain all the appropriate parties to this litigation. These appellees should have known that they would be parties to the suit once he conducted discovery in his case. Finally, these appellees had notice of the original action within the period prescribed for commencing an action and service of process of the original complaint. Therefore, Mr. Noland satisfied all of the factors set forth in Brooks.

Furthermore, Mr. Noland has proceeded prudently in pursuing his claims against the defendants under the understanding that pursuant to Klettner, the statute of limitation begins to run four months after the appeal period in the underlying case expires. This interpretation was also accepted by the Circuit Court in its Memorandum dated June 27, 2005. Therefore, Mr. Noland's good faith interpretation of the present law is certainly enough to allow the relation back

under the same doctrine. Accordingly, this Honorable Court should find that the Amended Complaint properly relates back to the date of the original complaint.

III. CONCLUSION

The Raleigh County Circuit Court correctly ruled that Mike Noland is entitled to coverage and a defense for the third-party claims of BARH against him from May 24 through August 1, 2000. However, the Circuit Court erred when it declined to reconsider its ruling that Noland is not entitled to indemnity and a defense after August 1, 2000.

As an insured under the VIR Primary Policy, it is undisputed that petitioner Noland is also an insured under the VIR Umbrella Policy. In its July 25, 2003 Memorandum and Order, the Circuit Court mistakenly treated the VIR Umbrella Policy as an additional primary policy, rather than as an excess policy which takes effect upon the exhaustion of policy limits under the VIR Primary Policy. The Circuit Court's ruling negates the intended effect of the VIR Umbrella Policy. Assuming *arguendo* the limits of the VIR Primary Policy were exhausted by the August 1, 2000 settlement, plaintiff remains insured by the VIR Umbrella Policy and must be afforded a defense and indemnity under the provisions of that policy.

Moreover, the Circuit Court's ruling does not fully consider the effect of the ambiguity of the exhaustion provision found in the VIR Primary Policy. The exhaustion provision not only does not address the issue of how policy limits are to be applied in claims where there are multiple insureds, and it does not address the issue of how policy limits are to be applied in favor of the insureds when there are

also claims against the insurer itself which were paid out as part of this settlement. This ambiguity must be construed in favor of the insured, Mike Noland, and has created a reasonable expectation of coverage in favor of Mr. Noland.

The Circuit Court should have reconsidered and reversed its earlier ruling, and found that Mr. Noland is entitled to coverage and a defense under the VIR Umbrella Policy with respect to BARH's third-party claim from August 1, 2000 to the present. Because the Circuit Court did not do so, appellant Noland now asks this Honorable Court to correct this clear mistake, by reversing the judgment of the Raleigh County Circuit Court.

The Circuit Court also erred in granting the motions to dismiss of appellees Stocks, Hyman, Coverage Options Associates, and the Kentucky Hospital Association. The Circuit Court applied an improper standard in granting appellees' motions to dismiss. The appellant asserted facts in his Amended Complaint upon which relief can be granted. He clearly stated a claim against the appellees. The Circuit Court should have viewed the facts asserted in the Amended Complaint in a light most favorable to appellant Noland and should have denied the motions to dismiss, which should rarely be granted.

Furthermore, the Circuit Court erroneously applied the applicable statute of limitations to the Amended Complaint. Although the statute of limitations clearly is one (1) year, that one-year statute of limitations does not begin to run until the appeal period has expired on the underlying cause of action upon which the statutory claim under the UTPA is predicated. At the time the Amended Complaint

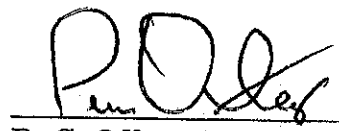
was filed and at the time the Amended Complaint was dismissed by the Circuit Court, the statute of limitations had not even begun to run on the UTPA claims asserted by petitioner. Moreover, the binding West Virginia law establishing the applicable statute of limitations draws no distinction between a first-party bad faith action under the UTPA and a third-party bad faith action. The Circuit Court clearly erred when it held that Noland's Amended Complaint violated the applicable one-year statute of limitations, because the statue had not yet begun to run.

Because the Circuit Court erred in a number of ways when it dismissed Noland's Amended Complaint, this Honorable Court must correct these mistakes by reversing the judgment of the Raleigh County Circuit Court.

WHEREFORE, for all of the foregoing reasons, appellant, by counsel, hereby respectfully requests that this Honorable Court reverse the judgments of the Raleigh County Circuit Court on the liability issues addressed herein, enter an order ruling in Noland's favor on VIR's duty to indemnify and defend and requiring the VIR to provide coverage and a defense to Noland from August 1, 2000 to present, and re-instating his Amended Complaint against Stocks, Hyman, Coverage Options Associates and the Kentucky Hospital Association, for an award of his costs and attorney's fees incurred in the prosecution of this matter, and for such other relief as this Honorable Court deems just.

LLOYD MICHAEL NOLAND, R.N.,

BY COUNSEL,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LLOYD MICHAEL NOLAND, R.N.

Petitioner,

v. **Appeal No.: 34702**

VIRGINIA INSURANCE RECIPROCAL, and THE RECIPROCAL GROUP, INC., a Virginia Corporation, LISA HYMAN, individually, COVERAGE OPTIONS ASSOCIATES a.k.a. KENTUCKY HOSPITAL SERVICE COMPANY, a Kentucky Limited Liability Company, KENTUCKY HOSPITAL ASSOCIATION, a Kentucky Corporation, and RICHARD STOCKS,

Respondents.

CERTIFICATE OF SERVICE

I, Perry W. Oxley, counsel for the petitioner, Lloyd Michael Noland, R.N., do hereby state that the foregoing **"Reply Brief of Appellant, Lloyd Michael Noland, R.N."** was served upon counsel of record, via U. S. Mail, postage prepaid, this 13th day of **April, 2009:**

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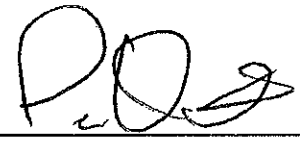

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